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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

FLORIDA NATIONAL GUARD AND
DEPARTMENT OF DEFENSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Labor Relations Authority reasonably construed the Federal Service Labor-Management Relations Statute (5 U.S.C. (Supp. V) 7101 *et seq.*) and concluded that an employee who is on official (paid) time under 5 U.S.C. (Supp. V) 7131(a), while representing an exclusive representative at Federal Service Impasses Panel proceedings, is entitled to payment from his employing agency for travel expenses and per diem.*

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*All the parties in the United States Court of Appeals for the Eleventh Circuit are listed in the caption with the exception of the National Association of Government Employees, Local R5-91 ("NAGE"). NAGE intervened on behalf of the Federal Labor Relations Authority before the court of appeals. The National Treasury Employees Union and the American Federation of Government Employees, AFL-CIO, were also granted leave to participate as amici curiae before the court of appeals.

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No.

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PETITIONER

v.

FLORIDA NATIONAL GUARD AND
DEPARTMENT OF DEFENSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 699 F.2d 1082 (11th Cir. 1983). The decision and order of the Federal Labor Relations Authority (App. C, *infra*, 15a-28a) is reported at 5 F.L.R.A. No. 49 (March 20, 1981).

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1983 (App. B, *infra*, 13a-14a), and the petition for writ of certiorari has been filed within 90 days of

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[1] The caption below reads *Florida National Guard and Department of Defense* v. *Federal Labor Relations Authority*.

that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATUTES INVOLVED

This case involves Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which is referred to as the Federal Service Labor-Management Relations Statute, 5 U.S.C. (Supp. V) 7101 *et seq.* (hereinafter the "Labor-Management Statute"). Of particular relevance to this case are sections 7131(a) and 7101(a) of the Labor-Management Statute.

5 U.S.C. (Supp. V) 7131 provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

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[2] The Solicitor General has authorized the filing of this petition.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. (Supp. V) 7101(a) provides:

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

5 U.S.C.. (Supp. V) 5702(a) provides:

> Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

STATEMENT OF THE CASE

1. The Labor-Management Statute governs labor-management relations in the federal service. The Federal Labor Relations Authority (hereinafter "Authority" or "FLRA") was established as an independent agency in the executive branch to administer the Labor-Management Statute, provide leadership in establishing policies and guidance thereunder, and ensure compliance with the statutory rights and obligations of federal employees, labor organizations which represent such employees, and federal agencies. *See* 5 U.S.C. (Supp. V) 7105.[3]

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[3] Congress found that the statutory protection of collective bargaining and employee participation through labor organizations safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlement of employee-employer disputes involving conditions of employment. 5 U.S.C. (Supp. V) 7101(a). Further, Congress found that labor organizations and collective bargaining in the civil service are in the public interest. *Id.* Consistent with these findings, the Statute requires an agency to accord exclusive recognition to a union elected as the representative by employees in an appropriate bargaining unit as de-

Congress has entrusted the Authority with, among other things, the power to determine appropriate units for union representation, conduct representation elections, decide issues relating to the statutory duty to bargain in good faith, resolve unfair labor practice complaints, rule on exceptions to arbitrators' awards, and take such other actions as are necessary and appropriate to administer effectively the provisions of the Labor-Management Statute. 5 U.S.C. (Supp. V) 7105(a)(2)(A), (B), (E), (G), (H), and (I), respectively.[4]

The Authority is empowered to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United

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termined by the Authority. 5 U.S.C. (Supp. V) 7111(a). A union which has been accorded exclusive recognition represents, and is entitled to act for and negotiate collective bargaining agreements covering, all employees in the unit. 5 U.S.C. (Supp. V) 7114(a)(1). The union must represent the interests of all employees in the unit without discrimination and without regard to union membership. *Id.*

After a union has been accorded exclusive recognition, the agency and union have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. (Supp. V) 7114(a)(4). This duty includes the parties' obligation to be represented at negotiations by authorized representatives prepared to discuss and negotiate on any condition of employment, and to meet at reasonable times and convenient places as frequently as may be necessary. 5 U.S.C. (Supp. V) 7114(b)(2) and (3). Moreover, any agency is required to grant official (paid) time to an employee representing an exclusive representative in the negotiation of a collective bargaining agreement. 5 U.S.C. (Supp. V) 7131(a).

[4] Prior to creation of the Authority and enactment of the Labor-Management Statute, labor-management relations in the federal service had been governed by Executive orders. *See* Executive Order 10988, 3 C.F.R. 521 (1959-1963 Compilation) and Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312.

States courts of appeals. 5 U.S.C. (Supp. V) 7123(b).[5] Persons, including federal agencies and unions, aggrieved by any final order of the Authority may seek judicial review in the courts of appeals. 5 U.S.C. (Supp. V) 7123(a).

2. This case came before the Authority on a stipulated record, with no facts in dispute (App. A, *infra*, 2a). The union was the exclusive representative for a unit of Florida National Guard employees.[6] The Florida National Guard (hereinafter "agency") and the National Association of Government Employees, Local R5-91 (hereinafter "union") were parties to a collective bargaining agreement that expired on January 28, 1978 (*id.*). While negotiations were held in an attempt to reach a new collective bargaining agreement, the terms of the expired agreement were continued in effect. During the course of the parties' negotiations a bargaining impasse arose, and the parties referred their disagreements to the Federal Mediation and Conciliation Service. After these attempts to resolve the parties' disagreements proved unfruitful, they sought assistance from the Federal Service Impasses Panel (hereinafter "FSIP" or "Impasses Panel"). The Impasses Panel then directed that a factfinding hearing be conducted in St. Augustine, Florida (*id.*).

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[5] The Labor-Management Statute proscribes certain conduct by agencies or unions as unfair labor practices. For example, an agency may not "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this [Labor-Management Statute]" (5 U.S.C. (Supp. V) 7116(a)(1)) or "otherwise fail or refuse to comply with any provision of this [Labor-Management Statute]" (5 U.S.C. (Supp. V) 7116(a)(8)).

[6] Technicians are employed, pursuant to the National Guard Technicians Act of 1968, Pub. L. No.90-486, 32 U.S.C. 709 (1976), in full-time civilian positions by the National Guard. In their federal civilian capacity, such technicians are included within the coverage of the Labor-Management Statute. 5 U.S.C. (Supp. V) 7103(a)(2) and (3).

Ronald Meier, an employee of the Florida National Guard at Jacksonville, Florida, and president of the union local, attended two days of hearing. Meier was sworn in and testified throughout the day at these hearings in his official capacity as president of, and negotiator for the union local (App. A, *infra*, 3a). On both days of hearing, Meier traveled approximately 58 miles and 1½ hours each way, to and from the FSIP proceedings in St. Augustine, Florida (App. C, *infra*, 16a). Meier claimed and was granted official time for the hours he spent at the hearing which corresponded to his normal duty hours (App. A, *infra*, 3a). However, the agency refused to grant or pay Meier's claim for official time or travel and per diem expenses related to his travel time from his duty station in Jacksonville to the hearing in St. Augustine (*id.*). Based on the agency's action in this respect, the union filed an unfair labor practice charge with the Authority and in March of 1981 the Authority issued its final determination in this matter. (App. C, *infra*, 15a).

The Authority found that under section 7131(a) (*see supra* at 2) Meier was entitled to official time to cover his travel to and from the Impasses Panel hearings. Explicitly relying upon and adopting its Interpretation and Guidance [hereinafter "Interpretation"] issued on December 19, 1979 (2 F.L.R.A. No. 31, App. D, *infra*, 27a-38a), the Authority also determined that the agency was responsible for Meier's travel and per diem expenses (App. C, *infra*, 18a-22a).

The agency did not challenge the Authority's determination that Meier was entitled to official time for the time he spent traveling to and from the Impasses Panel proceedings (App. A, *infra*, 3a). However, the agency did dispute the Authority's conclusion that it was obligated to pay Meier's travel and per diem expenses (*id.*). The focus of this determination, as mentioned previously, was the Authority's Interpretation. In this

Interpretation, the Authority concluded that employees on official time under 5 U.S.C. (Supp. V) 7131(a), while representing a union in the negotiation of a collective bargaining agreement with an agency, are entitled to payment from that agency for their travel expenses and per diem (App. D., *infra*, 27a-38a).

In support of this conclusion, the Authority specifically noted Congress' express rejection of attempts to incorporate the restrictive official time policies of Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312 [hereinafter the "Executive Order"], under which payment of travel expenses and per diem was not authorized, into the Labor-Management Statute (App. D, *infra*, 33a-34a n.6). In this regard, while acknowledging that neither the language nor the legislative history of the Labor-Management Statute expressly adverts to payment of travel expenses or per diem, the Authority pointed out that the official time provisions under 5 U.S.C. (Supp. V) 7131(a) are completely different from those of the rejected Senate bill, which sought to maintain the language of the official time provisions under the Executive Order. Thus, unlike under the Executive Order which strictly limited the amount of official time which might be authorized for negotiation activities by employee union representatives, section 7131(a) contains no such limitation. As explained by the House Report, such employee is on "paid time" and entitled to his or her usual compensation. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978) (*id.* at 33a). The Authority further explained that unlike under the Executive Order, the encouragement of collective bargaining is a stated purpose of the Labor-Management Statute (*id.* at 33a-34a n.6).

Additionally, the Authority emphasized that, under the Labor-Management Statute, employees participating in negotiation activities pursuant to 5 U.S.C. (Supp.

V) 7131(a) are engaged on official government business and are therefore authorized payment of travel and per diem expenses, under 5 U.S.C. (Supp. V) 5701 *et seq.* (App. D, *infra*, 33a-34a). The Authority concluded that its determination that such employees are engaged on "official business for the Government" is compelled because of Congress' specific finding that collective bargaining is in the public interest and contributes to the effective conduct of public business, and from the statutory requirement that parties conduct their negotiations in good faith, including meeting at reasonable times and convenient places as frequently as may be necessary. *See* 5 U.S.C. (Supp. V) 7101(a), 7114, 7116(a)(5) and (b)(5) (*id.*).

Moreover, as explained by the Authority, the payment of travel expenses and per diem also implements Congress' intent more nearly to equate the status of union and management negotiators. Reducing this inequality facilitates more effective union representation at the bargaining table, which in turn encourages collective bargaining and contributes to the effective conduct of public business. 5 U.S.C. (Supp. V) 7101(a). In this connection, the Authority stated that agencies uniformly pay travel expenses and per diem for management negotiators, and Congress indicated in the legislative history that similar prerogatives are to be accorded employees serving as union negotiators under 5 U.S.C. (Supp. V) 7131(a).[7] (App. D, *infra*, 34a-35a).

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[7] The Authority quoted the following statement of Congressman Clay (124 Cong. Rec. 29188 (1978)):

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization.... Activities that involve labor-management contacts are not included in this section.... Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representa-

Finally, as the Authority pointed out, this conclusion is consistent with its previous interpretation of identical language in section 7131(c) which entitles employees on official time in Authority proceedings to travel and per diem expenses. 5 C.F.R. 2429.13 (1982). (*Id.* at 35a).

In view of the foregoing, the Authority ordered the agency to cease and desist from failing and refusing to provide payment of properly documented travel and per diem expenses to its employees participating on official time in collective bargaining under section 7131(a) of the Labor-Management Statute as duly designated representatives of the union, and to take appropriate affirmative action (App. C, *infra* at 22a-24a).

3. The court of appeals, in its decision, denied enforcement of the Authority's order for two reasons. First, the court determined that the Authority's decision was based on an interpretative rule [the Interpretation] which may be accorded less weight than rules issued pursuant to the delegated rulemaking authority of Congress [App. A, *infra*, 3]. Second, the court stated that the Authority's Interpretation was premised, at least in part, upon "the [Authority's] reading of the term 'official business' in 5 U.S.C. § 5702(a) [(*see supra* at 4)], a section not a part of the Authority's enabling Statute, but instead part of a subchapter administered by the General Services Administration, a lesser degree of deference is warranted" (App. A, *infra*, 6a; footnote omitted). The court, therefore declined to defer to the Authority's determination that collective bargaining on "official time" under the Statute constitutes official government business, entitling employee negotiators representing the union to travel expenses and per diem (*id.* at 7a-9a).

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tional activities *just as* management uses official time to carry out its responsibilities. (Emphasis in Interpretation.) (*Id.*)

Specifically relying on the majoritys reasoning in the Eighth and Second Circuit,[8] the court further rejected the Authority's determination that Congress, in enacting the Labor-Management Statute, expressly found that collective bargaining furthers the public interest (App. A, *infra*, 10a). According to the court, "[t]he Authority's reliance on a general declaration of policy by Congress [was] 'too thin a reed' to support the conclusion that collective bargaining on 'official time' is also 'official business.'" (*Id.*).

The court concluded that when Congress enacted the Labor-Management Statute, it explicitly rejected the Senate version of official time which incorporated the practice under the Executive Order, limiting the parties use of this time. Therefore, the court reasoned that congressional silence in the Labor-Management Statute indicated acceptance of the prior practice under the Executive Order that agencies were not authorized to pay travel and per diem expenses for employees serving as union negotiators (*id.* at 10a-11a). Finally, the court determined that union dues were collected for travel and per diem expenses and stated that "if the entire financial burden of the negotiating process were shouldered by the government, inequality—not equality—of bar-

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[8] In both cases the courts of appeals were called upon to review the Authority's determination, as explicated in its Interpretation and Guidance (App. D, *infra* at 17a-19a), that employees, on official (paid) time under 5 U.S.C. (Supp. V) 7131(a), while representing an exclusive representative in collective bargaining negotiations, are entitled to payments from their employing agency for travel expenses and per diem. *United States Department of Agriculture* v. *Federal Labor Relations Authority*, 691 F.2d 1242 (8th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3625 (U.S. Dec. 13, 1982) (No. 82-979); *Division of Military and Naval Affairs* v. *Federal Labor Relations Authority*, 683 F.2d 45 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3596 (U.S. Dec. 16, 1982) (No. 82-1021).

gaining status would result" (*id.* at 11a; footnote omitted).

REASONS FOR GRANTING THE PETITION

In *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority and National Treasury Employees Union, petition for cert. granted,* No. 82-799 (Jan. 17, 1983), the Solicitor General, on behalf of the Bureau of Alcohol, Tobacco and Firearms, has sought review of a decision of the Ninth Circuit involving the same issue raised in the petition in the instant case.[9] The Ninth Circuit, in a unanimous decision, enforced the Authority's order and denied the petition for review filed by the Bureau of Alcohol, Tobacco and Firearms.[10]

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[9] Other cases involving the same issue are also pending in the Sixth, Eleventh, and District of Columbia Circuits. *See, e.g., United States Customs Service and National Treasury Employees Union* v. *FLRA*, Nos. 83-3033, 82-3596 (6th Cir. filed Jan. 17, 1983 and Sept. 27, 1982); *Internal Revenue Service* v. *FLRA*, No. 82-8551 (11th Cir. filed Aug. 27, 1982); *Bureau of the Mint and United States Customs Service* v. *FLRA*, Nos. 82-1194, 82-1195 (D.C. Cir. filed Feb. 24, 1982).

[10] The Ninth Circuit's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, is reported at 672 F.2d 732 (9th Cir. 1982), *cert. granted,* ____ U.S. ____, 103 S. Ct. 784, 74 L.Ed.2d 992 (1983). Here the court was also called upon to review the Authority's determination as explicated in its Interpretation (App. D, *infra* at 17a-29a) that employees on official (paid) time under 5 U.S.C. (Supp. V) 7131(a), while representing an exclusive representative in collective bargaining negotiations, are entitled to payments from their employing agency for travel expenses and per diem. In its opinion in that case, the Ninth Circuit concluded (672 F.2d at 738):

> The FLRA's Interpretation and Guidance is reasoned and supportable, and therefore will be given deference by this Court. The FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII [the Labor-Management Statute] in a clearly defensible manner, and

In a memorandum filed on December 13, 1982, in response to the petition for a writ of certiorari in that case, the Authority urged that the Ninth Circuit's decision was correctly decided. However, in view of the conflict in the circuits and the importance and recurrent nature of the issue, the Authority indicated that it did not oppose granting the petition.

The Court granted the petition for certiorari in No. 82-799, and the case is currently being briefed.

CONCLUSION

The instant petition for a writ of certiorari should be held and disposed of in light of the disposition of *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA and National Treasury Employees Union*, No. 82-799.

Respectfully submitted,

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we are neither permitted not inclined to substitute a different judgment.

APPENDIX A

FLORIDA NATIONAL GUARD AND DEPARTMENT OF DEFENSE, PETITIONERS, CROSS-RESPONDENTS,

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT, CROSS-PETITIONER.

No. 81-5466.

United States Court of Appeals, Eleventh Circuit.

March 7, 1983.

Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority.

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

KRAVITCH, Circuit Judge:

The Florida National Guard and the United States Department of Defense[1] petition for review of an order of the Federal Labor Relations Authority (FLRA) directing the Guard to pay the travel and per diem expenses incurred by union representatives while negotiating on behalf of the union. Although this is the first time we have been presented with such a challenge, three other circuit courts have addressed this

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[1] Although a state militia, the Florida National Guard is federally administered under Title 32 of the United States Code by the National Guard Bureau, a joint bureau of the Departments of the Army and the Air Force. Therefore, the Department of Defense appears as petitioner with the Guard.

precise issue.[2] The Eighth and Second Circuits denied enforcement of the FLRA order. *United States Department of Agriculture* v. *Federal Labor Relations Authority*, 691 F.2d 1242 (8th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3625 (U.S. Dec. 13, 1982) (No. 82-979); *Division of Military and Naval Affairs* v. *Federal Labor Relations Authority*, 683 F.2d 45 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3596 (U.S. Dec. 16, 1982) (No. 82-1021). The Ninth Circuit upheld the Authority. *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 672 F.2d 732 (9th Cir. 1982), *cert. granted*, ___ U.S. ___, 103 S.Ct. 784, 74 L.Ed.2d___ (1983). Because we conclude that the FLRA incorrectly interpreted the statutes and legislative history pertinent to this issue, we align ourselves with the Eighth and Second Circuits and deny enforcement of the Authority's order.

FACTUAL BACKGROUND

The facts in this case were stipulated by the parties. Therefore, we only summarize them here.

The Florida National Guard and the National Association of Government Employees were parties to a collective bargaining agreement that expired in January 1978. While negotiating a new agreement, the parties continued to operate under the terms of the expired contract. A bargaining impasse arose, and the parties referred the dispute to the Federal Service Impasses Panel for resolution. An intervening tentative agreement was rejected by the union membership. The Impasses Panel then directed that a fact-finding hearing be conducted in St. Augustine, Florida.

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[2] The District of Columbia Circuit is faced with a similar challenge in *Bureau of the Mint* v. *Federal Labor Relations Authority*, Nos. 81-1195, 82-1195 (D.C.Cir.).

Ronald Meier, a technician[3] in the Florida National Guard and then president of the union local, attended the two days of hearings in his capacity as a negotiator for the union local. Meier was granted official time for the hours he spent at the hearing that corresponded with his duty hours, but was granted neither official time for his travel time from his duty station in Jacksonville to the hearing in St. Augustine nor travel and per diem expenses.

The union filed an unfair labor practice charge, and in March 1981, the Federal Labor Relations Authority ruled that under 5 U.S.C. § 7131(a)[4] Meier was entitled

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[3] National Guard technicians are employed to meet the "day-to-day administrative, training and logistical needs of the Guard." *Division of Military and Naval Affairs* v. *Federal Labor Relations Authority*, 683 F.2d 45, 46 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3596 (U.S. Dec. 16, 1982) (No. 82-1021). *See Simpson* v. *United States*, 467 F.Supp. 1122, 1124 (S.D.N.Y.1979). These civilian technicians are classified as federal employees. 32 U.S.C. § 709(d).

[4] 5 U.S.C. § 7131 provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

to official time to cover his travel to and from the impasse hearings. The Authority, relying on an Interpretation and Guidance, 2 F.L.R.A. 264 (1979), also determined that the Guard was responsible for Meier's travel and per diem expenses. The Guard does not challenge the determination that Meier was entitled to official time for the time spent travelling. It does, however, contest the conclusion that the Guard must pay his travel and per diem expenses. Because the FLRA's order is premised upon the 1979 Interpretation and Guidance, we focus upon the Interpretation itself. *See Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 672 F.2d 732, 735 (9th Cir. 1982), *cert. granted*, ____ U.S. ____, 103 S.Ct. 784, 74 L.Ed.2d ____ (1983).

STANDARD OF REVIEW

Judicial review of FLRA decisions "shall be on the record in accordance with section 706 [of Title V]." 5 U.S.C. § 7123(c). 5 U.S.C. § 706(2)(A) provides that an agency's action should be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." For two reasons, however, this standard does not apply with its normal force to the instant case.

(d) Except as provided in the preceeding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Section 7134 of Title 5 of the United States Code[5] grants the FLRA the authority to promulgate rules and regulations. The Interpretation and Guidance, however, was not promulgated pursuant to that authority. Rather, it was issued pursuant to 5 U.S.C. § 7105(a)(1),[6] which requires the Authority to take the lead in establishing guidelines and policies in the area of federal labor relations.

> As an interpretative rule, therefore, [the Interpretation and Guidance] may be accorded less weight than rules issued pursuant to the delegated rulemaking authority of Congress. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141, 97 S.Ct. 401, 410, 50 L.Ed.2d 343 (1976). The Supreme Court has stated that although interpretative rules reflect an agency's special expertise and are thus entitled to deference, their weight on judicial review will also depend on the thoroughness evident in their consideration, the validity of the reasoning, and their consistency with earlier and later pronouncements. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

Bureau of Alcohol, Tobacco and Firearms v. *Federal Labor Relations Authority*, 672 F.2d 732, 735 (9th

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[5] 5 U.S.C. § 7134 provides:

> The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

[6] 5 U.S.C. § 7105(a)(1) provides:

> The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

Cir. 1982), *cert. granted*, ___ U.S. ___, 103 S.Ct. 784, 74 L.Ed.2d ___ (1983).

[1] Additionally, because the FLRA's Interpretation and Guidance is premised, at least in part, upon the Authority's reading of the term "official business" in 5 U.S.C. § 5702(a),[7] a section not part of the FLRA's enabling statute, but instead part of a subchapter administered by the General Services Administration, a lesser degree of deference is warranted. "No great deference is due an agency interpretation of another agency's statute." *Division of Military and Naval Affairs* v. *Federal Labor Relations Authority*, 683 F.2d 45, 48 (2d Cir.) (citing *New Jersey Air National Guard* v. *Federal Labor Relations Authority*, 677 F.2d 276, 281 n.6 (3d Cir.1982)), *petition for cert. filed*, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1021). *See also United States Department of Agriculture* v. *Federal Labor Relations Authority*, 691 F.2d 1242, 1246-47 (8th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3484 (U.S. Dec. 13, 1982) (No. 82-979). Thus, although we do not deem it proper to accord the FLRA's interpretation of the law no weight at all, neither will we blindly accept its rationale. We consider it proper to accord the Interpretation and Guidance that amount of deference and

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[7] 5 U.S.C. § 5702(a) provides:

> Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

respect that its internal logic and thoroughness warrant.[8]

ANALYSIS

[2] In its Interpretation and Guidance, the FLRA concedes that neither the statute nor the legislative history of Title VII of the Civil Service Reform Act of 1978, known commonly as the Federal Labor-Management Relations Act, expressly discusses the payment of travel and per diem expenses for union negotiators. To reach its conclusion that such expenses are congressionally mandated, the FLRA looks to its own enabling statute and to 5 U.S.C. § 5702(a), a statute administered by the General Services Administration.

The Authority's first premise is that an employee negotiating on behalf of the union membership is entitled to "official time" under 5 U.S.C. § 7131(a). Neither we nor the petitioners dispute that. Next, the FLRA cites 5 U.S.C. § 5702(a) for the truism that travel and per diem expenses are authorized when an employee "is engaged on official business for the Government." The great leap of faith occurs in moving to the conclusion that "an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on 'official business for the Government.'" 2 F.L.R.A. at 269 (1979).

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[8] The Ninth Circuit accorded greater deference to the Interpretation and Guidance, determining that if the FLRA's position is reasonably defensible and supportable it must be upheld. *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 672 F.2d 732, 735-36 (9th Cir 1982), *cert granted*, ____ U.S. ___, 103 S.Ct. 784, 74 L.Ed.2d ____ (1983). Even if we agreed that the Ninth Circuit's standard is the correct one to be applied, the FLRA's Interpretation and Guidance still would not pass muster.

The FLRA's attempt at bridging the gap between the congressional decision that "official time" should be accorded and the conclusion that union negotiators are performing the Government's official business and therefore are entitled to travel and per diem expenses is predicated on Congress' statement of intent in adopting the Federal Labor-Management Relations Act:

> (a) The Congress finds that—
>
> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
>
> (2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.
>
> (b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7101. Because Congress found that collective bargaining "contributes to the effective conduct of public business," the FLRA reasons, Congress must mean that such bargaining constitutes "official business" within the definition of 5 U.S.C. § 5702(a).[9] Like the Eighth and Second Circuits, we cannot agree with this interpretation. *See United States Department of Agriculture* v. *Federal Labor Relations Authority*, 691 F.2d 1242 (8th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3625 (U.S. Dec. 13, 1982) (No. 82-979); *Division of Military and Naval Affairs* v. *Federal Labor Relations Authority*, 683 F.2d 45 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3596 (U.S. Dec. 16, 1982) (No. 82-1021).[10]

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[9] The FLRA relies on the intent of Congres to equalize the bargaining positions of management and labor. In the Interpretation, the Authority quotes a discussion of the official time provision of the Act in which Representative Clay states that labor organizations "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." 124 Cong.Rec. H9, 638 (daily ed. Sept. 13, 1978) (statement of Rep. Clay), *quoted in* Interpretation and Guidance, 2 F.L.R.A. 264 (1979).

Nowhere in Representative Clay's statement, however, is there any reference to congressional intent to reimburse union negotiators for travel and per diem expenses. Congress expressed its intent to equalize the amount of official time for the parties involved in the negotiating process, but it did not address the issue before us in this case. As we note in the text, where Congress is silent and no intent can be discerned from the statutes or their history, the more prudent judicial course is to adopt the interpretation that does not require the outlay of additional funds. Congress' knowledge of the policy under Executive Order No. 11,491, as amended, supports our position.

[10] Both courts discuss the legislative history of the Federal Labor-Management Relations Act; our discussion of that history, therefore, is somewhat abbreviated. Neither court felt that the FLRA's Interpretation was entitled to a great amount of deference because of the Authority's reliance on 5 U.S.C. § 5702, which provides for the payment of travel and per diem

The Authority's reliance on a general declaration of policy by Congress is "too thin a reed" to support the conclusion that collective bargaining on "official time" is also "official business." *Division of Military and Naval Affairs*, 683 F.2d at 48.

> [T]he FLRA's Interpretation assumes that Congress authorized additional expeditures to cover travel expenses and per diem without making even an oblique reference to that effect. Because we are unwilling to impose additional financial liability on the Government without an affirmative directive from Congress, we prefer the interpretation that does not make the Government liable for these expenses.

United States Department of Agriculture, 691 F.2d at 1247 (citing *Brookfield Construction Co.* v. *United States*, 661 F.2d 159, 163-64 (Ct.Cl.1981)).

Congress' declaration that the statutory protection of collective bargaining is in the public interest does not imply an intent to underwrite the process entirely. Neither does its expressed intent to more nearly equalize the status of the parties in bargaining evidence a mandate to the Government to assume the full financial burden.

When Congress enacted Title VII of the Civil Service Reform Act of 1978, it rejected the Senate version of the official time provision that would have incorporated the existing limitation of official time under Executive Order No. 11,491, as amended. Under the Order, the parties were allowed to authorize up to forty hours or up to one-half the time spent in negotiations during regular duty hours. It was clear under the Order that

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expenses to "an employee while traveling on official business away from his designated post of duty." Without a clear expression of congressional intent, the Eighth and Second Circuits were reluctant to impose such a potentially enormous financial burden on the Government, and so are we.

agencies were *not* authorized to pay the travel and per diem expenses for employees serving as union negotiators.

[3] The FLRA argues that the expansion of "official time" in the Act as well as the endorsement of collective bargaining evidences the congressional intent to authorize the payment of travel and per diem expenses. We do not agree. Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning. *Lorillard* v. *Pons*, 434 U.S. 575, 580-81, 96 S.Ct. 866, 870, 55 L.Ed.2d 40, 46 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8, 95 S.Ct. 2362, 2370, n.8, 45 L.Ed.2d 280, 294 n.8 (1975). Congressional silence in the Act indicates acceptance of the prior practice.

It was not inconsistent for Congress to expand the availability of official time while disallowing the payment of travel and per diem expenses. Union dues are collected for such expenses. If the entire financial burden of the negotiating process were shouldered by the Government, inequality—not equality—of bargaining status would result.[11] In sum, we are not persuaded

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[11] If the Authority's position prevailed, the Federal Government would be the only federally regulated employer required to pay the travel and per diem expenses incurred by union negotiators. Payment of these costs by the employer in private sector negotiations is viewed as an extraordinary remedy by the National Labor Relations Board. The NLRB has exercised its power to compel payment of costs only as a remedy for the employer's failure to negotiate in good faith. *See Marriott In-Flite Services*, 258 N.L.R.B. No. 99 (Sept. 30, 1981); *J.P. Stevens & Co. Inc.*, 239 N.L.R.B. 738, 773 (1978). The payment of these costs as a matter of course represents a dramatic departure from prior practice in both the private sector and in the public sector under Executive Order No. 11,491, as amended.

The FLRA position is a windfall to unions, which would no longer bear the same economic incentive as the Goverment to

that Congress, without the briefest of references to the matter, intended the Government to assume this potentially enormous financial liability. Therefore, we grant the petition of review and DENY ENFORCEMENT.

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negotiate quickly and effectively. Equality dictates that each side bear its own travel and per diem costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5466

D.C. Docket No. 4-CA-300 5 FLRA No. 49

FLORIDA NATIONAL GUARD AND
DEPARTMENT OF DEFENSE,
PETITIONERS-CROSS-RESPONDENTS,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT, CROSS-PETITIONER.

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of the Florida National Guard and the U.S. Department of Defense for review of an order of the Federal Labor Relations Authority, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Federal Labor Relations Authority in this cause be, and the same is hereby, DENIED:

It is further ordered that respondent/cross-petitioner pay to petitioners/cross-respondents, the costs on appeal to be taxed by the Clerk of the Court.

A True Copy
Attested:
Clerk, U.S. Court of Appeals, Eleventh Circuit
By: J. Larkin
Deputy Clerk
Atlanta, GA.

MARCH 7, 1983
ISSUED AS MANDATE: APR 19, 1983

APPENDIX C

5 FLRA No. 49

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 4-CA-300

FLORIDA NATIONAL GUARD
RESPONDENT

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-91
CHARGING PARTY

DECISION AND ORDER

This matter is before the Authority pursuant to a stipulated record forwarded by an Administrative Law Judge to the Federal Labor Relations Authority for decision in accordance with a request from the Regional Attorney, agent for the Regional Director, pursuant to the authority granted the Regional Director in section 2429.1(a) of the Authority's rules and regulations (5 CFR 2429.1(a)).

Upon consideration of the entire record in this case, including the stipulation of facts, accompanying exhibits, and briefs submitted by the parties, the Authority finds:

The National Association of Government Employees, Local R5-91, is the exclusive representative of a unit of the Respondent's employees. The terms of the most recent three-year contract, which expired January 28, 1978, continue in effect pending an agreement on a new contract. The expired contract contains a Memorandum of Understanding that limits official time for contract

negotiations, including travel time, to 40 hours per year per employee representative.

The Union requested assistance from the Federal Service Impasses Panel (FSIP) and following an unsuccessful attempt to reach an agreement, a notice of hearing was issued scheduling a factfinding hearing for August 23, 1979. A prehearing conference was held on August 22 from 9:00 a.m. to 6:15 p.m. and the hearing was held on August 23 from 9:00 a.m. to 5:30 p.m. at St. Augustine, Florida.

The Union was represented by, among others, Ronald L. Meier, president of the local union and employee of Respondent. He attended both days. Meier drove from Jacksonville to St. Augustine each day, a distance of 58 miles. Travel time was about 1½ hours, each way. His regular work day was from 6:30 a.m. to 3:15 p.m.

On June 14, 1979, the Respondent had issued an intra-office memorandum stating that under the Civil Service Reform Act, unlimited negotiation on the clock, but not travel or preparation time, would be allowed for union negotiators. About a month before the FSIP hearing, at a Federal Mediation and Conciliation Service (FMCS) mediation session, Meier had asked the Respondent about official time for travel. Colonel McCormick, the Respondent's chief negotiator and technician personnel officer, informed Meier that travel time would be denied, and Meier replied that he would file an unfair labor practice charge.

A few days after the FSIP hearing, Meier was informed by his immediate supervisor that he would be given eight hours of administrative leave for each day he attended the hearing, not the 12 and 13 hours claimed. However, the Respondent issued a "corrective memo" giving Meier only six hours administrative leave (determined by the Respondent to be the actual negotiating time corresponding to Meier's duty time) and

charging him two hours annual leave for each of the two days of hearings. (The administrative leave was granted despite the acknowledged fact that Meier had exceeded the 40-hour per annum limitation of the expired contract.) Meier had also requested mileage and per diem expenses for each day, which the Respondent refused.

An unfair labor practice charge was filed by the Union alleging that the Respondent violated sections 7116(a)(1), (6) and (8) of the Statute by failing and refusing to authorize adequate official time and travel and per diem expenses within the provisions of section 7131(a) for the Union representative, President Ronald Meier, regarding his attendance at FSIP hearings on August 22 and 23, 1979. Upon an investigation, the General Counsel issued a complaint alleging that the Respondent had failed and refused to give Meier adequate official time and travel and per diem expenses. In this regard, the General Counsel argued that Meier was entitled to "travel time" to the location site of the hearing because the travel to the FSIP proceeding occurred at a time when he would otherwise have been in a duty status, and that he was entitled to mileage for the travel and per diem for both days of attendance. It is contended by the General Counsel that the refusal to provide such travel time, mileage and per diem constitutes a violation of section 7116(a)(1), (6) and (8). As noted above, the matter is before the Authority pursuant to a stipulation of facts.

Section 7131(a), *inter alia*, requires that:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status.

The Respondent granted official time for Meier for that portion of his duty status when he was attending impasse proceedings. At issue herein is that portion of Meier's duty status time spent traveling from his residence to the site of the impasse proceeding, that is, "travel time" related to official time activities under section 7131(a). In the Authority's view, when it is required that an employee travel to participate in official time activities under section 7131(a), during the time the employee otherwise would be in a duty status, such travel time is part of the official time. In this regard, as was concluded in the Authority's *Interpretation and Guidance* on the meaning of section 7131(a), the legislative history relative to that section demonstrates an intent by Congress that employees serving as union representatives be accorded prerogatives similar to those accorded to management representatives in the negotiation of a collective bargaining agreement, including impasse proceeding.[1]

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[1] *Interpretation and Guidance*, 2 FLRA No. 31 (1979), at page 6, wherein it was noted,

> In this connection, Representative Clay, in discussing the proscription of official time for employees engaged in internal union business under section 7132(b) of the House Bill (which was enacted as section 7131(b) of the Statute) stated as follows:
>
> > Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization.... Activities that involve labor-management contacts are not included in this section.... Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added.] (Footnote omitted.)

There is nothing in the record of this case to indicate that a management representative would have been required to take annual leave to travel to the site of an impasse proceeding.

Turning to the facts of the instant case, Meier would have been in his regular duty status from 6:30 a.m. to 3:15 p.m. on August 22 and 23 but for his attendance those days at an impasse proceeding in another town. During the period of his regular duty status, i.e., 6:30 a.m. to 3:15 p.m., the record shows that each day Meier spent 1½ hours traveling to the hearing and 6¼ hours actually at the hearing. Accordingly, the Authority finds that Meier spent 7¾ hours of official time for each of the two days. The refusal by the Respondent to provide official time in this amount to Meier constitutes a failure to comply with the provisions of section 7131(a) in violation of section 7116(a)(8); a failure to cooperate in impasse procedures in violation of section 7116(a)(6); and interference with, restraint, and coercion of an employee in the exercise of rights under the Statute in violation of section 7116(a)(1).

With respect to travel and per diem expenses, in its *Interpretation and Guidance* the Authority noted that employees, while negotiating a collective bargaining agreement as union representatives, are clearly engaged on "official business for the Government," and concluded that such employees are "entitled to payments from agencies for their duty time and travel and per diem expenses."[2] Meier traveled to impasse proceedings, which are specifically provided for in section 7131(a) provisions, and therefore he was entitled to appropriate travel and per diem expenses, as may be provided under governing laws and regulations. The failure to provide such, as with the failure to provide official time, constitutes a violation of section 7116(a)(1), (6) and (8).[3] The Respondent contests the ju-

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[2] *Id.*, at pages 5 and 6.

[3] *Cf. Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California*, 4 FLRA No. 40 (1980) (wherein the Authority adopted the Administrative Law Judge's finding of a violation of section 7116(a)(1) and (8) of the Statute).

risdiction of the Authority to require, through an unfair labor practice proceeding, payment of monetary allowances by an agency. However, the Authority is empowered by section 7105(a)(2)(G) to resolve complaints of unfair labor practices, by section 7105(a)(2)(I) to take such other actions as are necessary and appropriate to effectively administer the provisions of the Statute, and by section 7118(a)(7)(D) to take such action as will carry out the purposes of the Statute. Where, as here, an agency is found to have failed to comply with requirements of the Statute, there is no basis for the contention that there is any limit to the jurisdiction of the Authority by virtue of the fact that the failure at issue involves a payment of monetary allowances. Moreover, pursuant to section 7105(g)(3), the Authority, in order to carry out its functions under the statute:

> may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

As to the Respondent's argument that entitlement to pay and allowances is governed by statutes, laws and regulations, and the argument that disputes over entitlement must be exhausted through military pay processes before an unfair labor practice charge can be considered, the issues before the Authority concern the noncompliance with requirements of the Statute. As stated above, such issues are specifically assigned to the Authority for disposition, notwithstanding that they may include issues of entitlement to pay and allowances.

Beyond the allegations concerning lack of jurisdiction, the Respondent contends that such monetary issues as are present herein are nonnegotiable "budget"

matters under section 7106(a)(1).[4] However, at issue here is not whether monetary issues are within the scope of bargaining under the Statute, but whether requirements of section 7131(a) have been met. In this connection, as stated above, the Respondent has failed to comply with these requirements.

Finally, Respondent raises by way of defense the argument that the 40-hour official time restriction for negotiations under the existing contract controls herein under the savings provision of section 7135(a)(1),[5] and is binding until a mutually agreeable contract is concluded. The Authority also addressed this issue in its *Interpretation and Guidance*, *supra*, at page 7, wherein it was noted that nothing in the Statute would preclude the parties from continuing the terms of any such agreement in existence on January 11, 1979, the effective date of the Statute. However, it was further stated,

> [W]here a labor organization or an agency *objects* to the continuation or renewal of a provision relating to official time *more restrictive* than section 7131(a), such objective prevents the continuation or renewal of the agreement provision under sec-

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[4] Section 7106(a)(1) provides, in pertinent part,

> [N]othing in this chapter shall affect the authority of any management official of any agency—
>
> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency ....

[5] Section 7135(a)(1) provides as follows:

> § 7135. Continuation of existing laws, recognitions, agreements, and procedures
>
> (a) Nothing contained in this chapter shall preclude—
>
> (1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter....

> tion 7135(a)(1) of the Statute. In that situation, the provisions of section 7131(a) would be immediately operative. (Emphasis added.)

In agreement with the General Counsel, the Authority finds that the Union indicated its objection to the continuation of the provision in the existing agreement when Meier informed agency officials that an unfair labor practice charge would be filed against the Respondent contesting the continued application of the contractual limitation. The Authority finds also that the official time provision of the negotiated agreement is more restrictive than the provisions of section 7131(a). Therefore, in the circumstances of this case, and consistent with the *Interpretation and Guidance* on this subject, the provisions of section 7131(a) of the Statute, rather than the provisions of the negotiated agreement, apply.

Accordingly, in view of the foregoing, the Authority concludes that the Respondent by its failure and refusal to provide Union representative Ronald Meier with appropriate official time and travel and per diem expenses while attending the FSIP hearings on August 22 and 23, 1979, failed and refused to cooperate in impasse procedures as required by section 7131 of the Statute in violation of sections 7116(a)(1), (6) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the rules and regulations of the Federal Labor Relations Authority and section 7118 of the statute, the Authority hereby orders that Florida National Guard, Jacksonville, Florida, shall:

1. Cease and desist from:

(a) Failing and refusing to provide Ronald Meier, or any Agency employee, official time and appropriate travel and per diem expenses for time engaged in

representing the National Association of Government Employees, Local R5-91, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement or attendance at an impasse proceeding, equal to what an employee engaged in official Agency business would be entitled.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide union representative Ronald Meier official time of 7¾ hours per day for the performance of his representational duties on August 22 and 23, 1979, and adjust the annual leave charged to him for both days accordingly, and, upon submission of an appropriate voucher, pay to Ronald Meier appropriate travel and per diem expenses equal to what an employee engaged in official Agency business would be entitled.

(b) Post at all of its offices in Jacksonville, Florida where unit employees are located, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Federal Labor Relations Authority, after being signed by the Adjutant General, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's rules and regulations, notify the Regional Director, Region 4, Federal Labor Relations Authority, in writing,

within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 20, 1981

/s/ Ronald Haughton
RONALD W. HAUGHTON,
Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III,
Member

/s/ LEON B. APPLEWHAITE
LEON B. APPLEWHAITE
Member

FEDERAL LABOR RELATIONS
AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY AND IN ORDER TO EFFECTUATE THE POLICIES OF CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide to Ronald Meier, or any Agency employee, official time and appropriate travel and per diem expenses for time engaged in representing the National Association of Government Employees, Local R5-91, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement or attendance at an impasse proceeding, equal to what an employee engaged in official Agency business would be entitled.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide Union representative Ronald Meier official time of 7¾ hours per day for the performance of his representational duties on August 22 and 23, 1979, and adjust the annual leave charged to him for both days accordingly, and, upon submission of an appropriate voucher, pay to Ronald Meier appropriate

travel and per diem expenses equal to what an employee engaged in official Agency business would be entitled.

_____
(AGENCY OR ACTIVITY)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region 4, Federal Labor Relations Authority, whose address is: 1776 Peachtree Street, NW., Suite 501, North Wing, Atlanta, Georgia 30309, and whose telephone number is (404) 881-2324.

APPENDIX D

2 FLRA No. 31

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Case Nos. O-PS-3 and O-PS-6

INTERPRETATION AND GUIDANCE

As previously announced,[1] the Authority determined, in conformity with its rules and regulations and the Federal Service Labor-Management Relations Statute (92 Stat. 1191), that an interpretation of the Statute was warranted on the following:

1) Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

2) Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Concurrently, the Authority invited interested persons to express their views in writing with respect to the above matters, including the impact, if any, of section 7135(a)(1) of the Statute (92 Stat. 1215) on these matters. The responses submitted to the Authority were most thorough and helpful and have been carefully considered. In view of the depth and scope of these submissions, the Authority has determined that no use-

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[1] Federal Labor Relations Authority, *Notice Relating to Official Time*, 44 Fed. Reg. 42,788 (July 20, 1979).

ful purpose would be served by providing an oral presentation of views.

SECTION 7131 OF THE STATUTE

As indicated above, both matters at issue pertain to section 7131 of the Statute (92 Stat. 1214), which reads as follows:

§ 7131. *Official time*

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this [Statute], any employee in an appropriate unit represented by an exclusive representative,

> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

We turn to the application of the above-quoted provisions, and particularly section 7131(a), to the matters here in question. For convenience of discussion, we shall consider the questions in reverse order.

NATURE OF NEGOTIATIONS TO WHICH OFFICIAL TIME APPLIES

The second of the two matters at issue is the following:

> Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Section 7131(a) expressly states in relevant part that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official time for such purposes, including attendance at impasse proceeding[s]." This section thus provides that when an exclusive representative and an agency undertake the negotiation of a "collective bargaining agreement," an employee representing the exclusive representative in that undertaking must be authorized official time for such purposes.

In this connection, the phrase "collective bargaining agreement" in section 7131(a) is defined at section 7103(a)(8) (92 Stat. 1193), as follows:

> (8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this [Statute].

The phrase, "collective bargaining," in turn, is defined in section 7103(a)(12) (92 Stat. 1194) as follows:

> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]

It is apparent from the specific language in these definitions that a "collective bargaining agreement" is any agreement that is entered into as a result of the performance of the mutual obligation of the parties to bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting employees in the appropriate unit. Consequently, the language reflects the intent of Congress that the entitlement of official time under section 7131(a) would encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Such conclusion as to the intent of Congress is supported by the legislative history of section 7131(a) of the Statute. More particularly, section 7131(a) is identical to section 7132(a) of the Bill (H.R. 11280) reported to the House by the House Post Office and Civil Service Committee.[2] In adopting the provisions in section 7132(a) of the House Bill, Congress rejected the relevant language in section 7232 of the Bill (S. 2640) re-

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[2] *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 288 (1978).

ported to the Senate by the Senate Governmental Affairs Committee.[3] That section of the Senate Bill had sought, in effect, to maintain the restrictions imposed upon the use of official time for negotiations by employees representing unions as established in E.O. 11491, as amended.

Significantly, as to section 7232 of the Senate Bill, the Senate Committee Report had stated that it applied "to the negotiation or renewal of a *basic* collective bargaining agreement, *as opposed* to negotiations which arise out of circumstances during the term of the basic agreement" (emphasis added).[4] The House Bill which was adopted by Congress contains wholly different provisions on the relevant subject of official time, and there is no indication whatsoever that Congress intended to limit the use of official time to the negotiation of basic agreements as contemplated by the rejected language of the Senate Bill.

Thus, the legislative history demonstrates that Congress intended, consistent with the specific language of section 7131(a) and the related definitions in section 7103(a)(8) and (12), that the entitlement of official time under section 7131(a) would apply whenever the parties undertake the negotiation of a collective bargaining agreement.

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[3] Section 7232 of the Senate Bill provided:

> Solicitation of membership or dues and other internal business of a labor organization shall be conducted during the nonduty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except that the negotiating parties may agree to arrangements which provide that the agency will authorize a reasonable number of such employees (not normally in excess of the number of management representatives) to negotiate on official time for up to 40 hours, or up to one-half the time spent in negotiations during regular working hours.

[4] S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978).

Apart from the literal language and legislative history of section 7131(a) of the Statute, the conclusion that Congress intended that official time apply to the negotiation of any collective bargaining agreement is supported by the express findings and purpose of the Statute as stated in section 7101(a), namely, that "labor organizations and collective bargaining in the civil service are in the public interest." Certainly, it would implement the ends of collective bargaining to sanction official time for all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement. For only in such manner may effective union representation comparable to the representation of management be achieved under the Statute, and only in this manner may both parties effectively fulfill their respective obligations under section 7114(b) of the Statute (92 Stat. 1202) "to meet at reasonable times . . . as frequently as may be necessary" for good-faith negotiations on conditions of employment of the unit employees.

Accordingly, for the reasons stated above, it is concluded that the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

ENTITLEMENT OF EMPLOYEES ON OFFICIAL TIME TO TRAVEL AND PER DIEM EXPENSES

As mentioned at the outset, the other matter here at issue is the following:

> Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to pay-

ments from agencies for their travel and per diem expenses.

On this issue it is clear from the Statute that employees who are on official time under section 7131 while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

As previously set forth, section 7131(a), which is principally here involved, provides that an employee representing an exclusive representative in the negotiation of a collective bargaining agreement shall be on official time "during the time the employee otherwise would be in a duty status." As explained in the House Report, an employee serving as a union representative is authorized "paid time" while engaging in the negotiation activities provided for in section 7131 (a) of the Statute.[5] Hence, while an employee is on official time representing an exclusive representative in the negotiation of a collective bargaining agreement, that employee is on paid time entitled to his or her usual compensation and is not in leave status.

Neither the Statute, nor its legislative history, expressly adverts to the payment of travel expenses or per diem during participation in these negotiation activities.[6] However, it is well established that such ex-

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[5] H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

[6] Under section 20 of E.O. 11491, as amended, travel expenditures were not authorized for union representatives engaged in negotiation activities *(Labor-Management Relations in the Federal Service* (1975) at 58). However, as previously indicated, Congress substantially rejected section 7232 of the Senate Bill which sought in effect to maintain the language of the Order. Moreover, unlike under section 20 of the Order which strictly limited the amount of official time which might be authorized for negotiation activities by union representatives, section 7131(a) of the Statute contains no such limitation. Further, unlike under

penses are authorized when an employee "is engaged on official business for the Government" (Chapter 57, Subchapter I—*Travel and Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining "contributes to the effective conduct of public business," and that "collective bargaining in the civil service [is] in the public interest." Further, Congress expressly mandated in sections 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1204). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on "official business for the Government."

Additionally, it is not controverted that management representatives are uniformly paid travel expenses and per diem when engaged in the negotiation of a collective bargaining agreement on behalf of management, and Congress indicated its intent that similar prerogatives be accorded employees serving as union representatives likewise engaged in the negotiation of a collective bargaining agreement. In this connection, Representative Clay, in discussing the proscription of official time for employees engaged in internal union business under section 7132(b) of the House Bill (which was enacted as section 7131(b) of the Statute) stated as follows:[7]

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization.... Activities that involve labor-management contacts are not included

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the Order, the encouragement of collective bargaining is a stated purpose of the Statute.

[7] 124 Cong. Rec. H9,638 (daily ed. Sept. 13, 1978).

> in this section.... Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added.]

The payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress, but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in section 7101(a), to encourage collective bargaining in the Federal sector.

Finally, it should be noted that section 7131(c) of the Statute, identical as here relevant to section 7131(a), provides that:

> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority *shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.* [Emphasis added.]

The Authority has previously interpreted that language of the Statute in section 2429.13 of its Interim Rules and Regulations, as entitling the employee on such official time to transportation and per diem expenses (44 Fed. Reg. 44771 (July 30, 1979)). No persuasive reason has been advanced for a contrary interpretation of the analogous language in section 7131(a) of the Statute, and no supported challenge has been advanced regarding the legality of the Authority's prior interpretation of the same critical language in section 7131(c).

In summary, any employee who is on official time under section 7131 of the Statute while representing an

exclusive representative in the negotiation of a collective bargaining agreement is entitled to payments from agencies for their duty time and travel and per diem expenses.

IMPACT OF SAVINGS PROVISIONS IN THE STATUTE

Lastly, the question as to the impact, if any, of the savings provisions in section 7135(a)(1) of the Statute on the above matters must be considered.[8] More specifically, the question is whether provisions in existing agreements which are more restrictive than section 7131(a) on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement, remain operative under section 7135(a)(1) of the Statute.

Section 7135(a) reads in relevant part as follows:

> (a) Nothing contained in this [Statute] shall preclude—
>
> (1) the renewal or continuation of . . . a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this [Statute][.]

By this express language of section 7135(a)(1), nothing in the Statute precludes the parties to a lawful agreement in existence on January 11, 1979, the effective date of the Statute, from mutually renewing or continuing the terms of that agreement if they so desire. Thus, for example, if the provisions of an existing agreement limit the authorization of official time to employee representatives of a union in the negotiation of a

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[8] The savings clause in section 7135(b) of the Statute (92 Stat. 1215) is clearly without impact, since the provisions of section 7131(a), which are here involved, are completely different from the related provisions in section 20 of E.O. 11491, as amended, and section 7131(a) thereby "supersedes" the "policies, regulations, and procedures established under" the Executive Order.

basic collective bargaining agreement, nothing in the Statute precludes the parties to such an existing agreement, if they wish, from mutually renewing or continuing the terms of that agreement.

However, where a labor organization or an agency objects to the continuation or renewal of a provision relating to official time more restrictive than section 7131(a), such objection prevents the continuation or renewal of the agreement provision under section 7135(a)(1) of the Statute. In that situation, the provisions of section 7131(a) would be immediately operative. That is, any employee representing an exclusive representative in the negotiation of a collective bargaining agreement would be entitled to official time, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement, and any employee on such official time under section 7131(a) of the Statute would be entitled to payments from the agency for their travel and per diem expenses.

CONCLUSION

It is the Authority's interpretation and guidance that:

1. The official time provisions of section 7131(a) of the Statute encompass negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

2. Employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their duty time and travel and per diem expenses.

3. Provisions in agreements existing on January 11, 1979, the effective date of the Statute, which are more restrictive than section 7131(a) of the Statute on the granting of official time, as well as the payment of trav-

el and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement may be renewed or continued if the parties so desire, under section 7135(a)(1) of the Statute. However, if either party to such provisions in an existing agreement objects to the continuation or renewal thereof, such objection prevents the continuation or renewal of those agreement provisions under section 7135(a)(1) of the Statute.

Issued, Washington, D.C., December 19, 1979.

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member
FEDERAL LABOR RELATIONS AUTHORITY